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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 205

WILLIAM D. KENT, as President of Flight Engineer Officers' Association, and as President of Flight Engineers' International Association—PAA Chapter, also known as Flight Engineer Officers' Association,

Petitioner,

v.

CIVIL AERONAUTICS BOARD, and PAN AMERICAN WORLD AIRWAYS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner,

v.

CIVIL AERONAUTICS BOARD, and PAN AMERICAN WORLD AIRWAYS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, William D. Kent, as President of Flight Engineer Officers' Association, and as President of Flight Engineers' International Association—PAA Chapter, also known as Flight Engineer Officers' Association, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit af-

firming, in a consolidated review proceeding, two orders of the Civil Aeronautics Board.[1]

Opinions Below

The opinion of the Court of Appeals, dated May 8, 1953 (R. Vol. III, pp. 116-120) appears at 204 F. 2d 263. The opinions of the Civil Aeronautics Board are reported at 12 C. A. B. 124 (First Proceeding, Order No. E-4634, decided September 22, 1950 (R. Vol. II, p. 6a)); and 3 Avi 17,391 (not yet officially printed, Second Proceeding, Order No. E-5894, decided November 28, 1951 (R. Vol. II, p. 33a)).

Jurisdiction

The judgments of the Court of Appeals were entered on June 4, 1953 (R. Vol. III, pp. 121-122). The jurisdiction of this Court is invoked under 49 U. S. C. Sec. 646(f) (Act of June 23, 1938, c. 601, Title X, § 1006, 52 Stat. 1024); and 28 U. S. C. Sec. 1254(1).

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[1] The Court of Appeals for the Second Circuit consolidated No. 21860, the petition for review of the order in the "first proceeding", and No. 22236, the petition for review of the order in the "second proceeding" (which was held after the first proceeding was reopened for further hearing) (R. Vol. II, pp. 4a-5a). It filed a single opinion (R. Vol. III, pp. 116-120) and treated the two cases as one.

The record on which this case was reviewed in the Court of Appeals for the Second Circuit, and on which it is presented here, consists of three volumes, referred to hereinafter as "R. Vol. I, p. 1", etc. Vol. I consists of the two printed Petitions for Review; Vol. II consists of Petitioner's Appendix; Vol. III consists of Respondents' Appendix, supplemented (pp. 116-122) by the opinion and judgments of the Court of Appeals for the Second Circuit. The typewritten record of the entire proceedings before the Civil Aeronautics Board in the *North Atlantic Route Transfer* case is voluminous (over 12,000 typewritten pages), only a portion of which is relevant to the instant case.

Questions Presented

1. Whether, upon the purchase of the assets of one airline by another, the Civil Aeronautics Board has the jurisdiction and authority to interfere with the seniority rights of the employees of the purchasing carrier by integrating the seniority lists of both carriers (thereby, in effect, writing a labor contract for the parties), and to prohibit permanently collective bargaining in respect to such integrated seniority lists.

2. Whether, upon such a purchase the Civil Aeronautics Board can override the provisions of a collective-bargaining contract between the purchasing carrier and its employees by integrating the seniority lists of both carriers.

Statutes Involved

Section 408 (b) of the Civil Aeronautics Act (52 Stat. 1001, 49 U. S. C. A. Sec. 488) directs that:

> "Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board * * * Unless after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order, approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, *upon such terms and conditions as it shall find to be just and reasonable*[2] and with such modifications as it may prescribe * * *."

Section 205(a) of the Civil Aeronautics Act (52 Stat. 984, 49 U. S. C. A., Sec. 425) provides, in pertinent part:

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[2] Italics throughout ours.

> "The Board is empowered to perform such acts, * * * to issue and amend such orders, * * * pursuant to and consistent with the provisions of this chapter, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this chapter."

The Railway Labor Act (44 Stat. 577, *et seq.*: 45 U. S. C. A., Sec. 181, *et seq.*), Section 203 (49 U. S. C. A., Sec. 183), provides in part:

> "The parties or either party to a dispute between an employee or a group of employees and a carrier or carriers by air may invoke the services of the National Mediation Board and the jurisdiction of said Mediation Board is extended to any of the following cases:
>
> "a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.
>
> "b) Any other dispute not referable to an adjustment board, as hereinafter provided, and not adjusted in conference between the parties, or where conferences are refused."

Statement

This case involves the purchase by Pan American World Airways, Inc. (hereinafter referred to as "Pan American") of the assets of American Overseas Airlines, Inc. (hereinafter referred to as "AOA") and the reshuffling of commercial aviation routes over the North Atlantic. The purchase agreement, approved by the Civil Aeronautics Board (hereinafter sometimes referred to as the Board) obligated Pan American to take over on the closing date all employees of AOA and to "endeavor to provide continued employment for them with Pan American, or one of its subsidiaries or affiliates * * *"

The petitioner represents the flight engineers employed by Pan American prior to the acquisition by Pan American of the assets of AOA (such flight engineers will hereinafter be referred to as the "Veteran Pan American Flight Engineers", the term applied to them during the course of the hearings before the Civil Aeronautics Board). These engineers work under a collective bargaining agreement with Pan American, a copy of which is annexed to the petition in the first case and is marked "Exhibit A" (R. Vol. I, pp. 8-35). This agreement establishes a system of seniority which governs promotions, lay-offs, transfers and the like. It provides in Article 5 that

> "(A) Seniority as an Engineer shall be based upon his length of service with the Company (Pan American World Airways, Inc.).[3]
>
> "(B) Seniority shall begin to accrue from the date of appointment as an Engineer with the Company and shall continue to accrue during such period of service, except as otherwise provided in this agreement" (R. Vol. I, p. 11).

Subsequent to its ratification of the agreement of purchase, the Civil Aeronautics Board issued an order purporting to impose conditions "for the protection of the employees of Pan American and AOA adversely affected by the consummation of the transactions * * *" (R. Vol. II, p. 6a). Primarily, this order imposed financial protective conditions for the compensation of employees adversely affected by the purchase. It provided (par. 6, R. Vol. II, pp. 26a-27a) that when an employee is displaced or "placed in a worse position with respect to his compensation" and

> "so long thereafter as he is unable, in the exercise of his seniority rights under existing agreements, rules

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[3] Name in parentheses inserted for clarity.

and practices and under subsequently negotiated agreements and rules to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the monthly compensation which would have been received by him in the position from which he was displaced" (R. Vol. II, p. 27a).

However, in addition to the financial protective conditions contained in the order, there was a provision (par. 3) that

"Pan American shall integrate into its existing seniority list for each category of employees for which such a list exists:

(a) all employees of Pan American who are presently covered by such lists;

(b) all employees of American Overseas referred to in paragraph 2 above who come within such category of employees;

* * *

or shall establish some other method for determination of seniority in each such category; each such seniority list or other method for determining seniority shall be established pursuant to agreement between it and the employee groups involved, or, failing such agreement, pursuant to the award in arbitration between it and the employee groups involved; * * *" (R. Vol. II, p. 25a).

After the petitioner had sought a review of this order in the Court of Appeals for the Second Circuit (No. 21860), the Civil Aeronautics Board reopened the entire matter,

new hearings were held and the Board eventually issued the order appealed from in the second case.

This order is printed as Exhibit "A" annexed to the petition in the second proceeding (R. Vol. I, pp. 64-70). It directed Pan American to integrate the seniority lists of Flight Engineers on the basis of the length of service of each engineer with his respective company. It gave AOA engineers the same rights as if they had been employed by Pan American on the date they were hired by AOA (or by AOA's predecessor company American Export Air Lines) (par. 3(b), R. Vol. I, p. 66). The order not only provided for such an integration of the seniority lists to the disregard of Pan American's contract with its Veteran Pan American Flight Engineers and other classes of employees, but also imposed upon Pan American a permanent injunction against freely contracting with its employees in the future in respect to seniority. It stated:

> "Pan American shall not enter into any agreement with any labor organization representing employees in the categories covered by this order, the effect of which would be to place employees of American and AOA in such categories transferred upon the consolidation of the operations of AOA and Pan American in a worse position with respect to their seniority relative to Pan American employees in such categories than is provided herein" (par. 11, R. Vol. I, p. 69).

The order was accompanied by a lengthy opinion (R. Vol. II, pp. 33a-61a) from which Joseph P. Adams, member of the Board, dissented (R. Vol. II, pp. 61a-65a) primarily on the ground that the Board in issuing the order was "exceeding its authority as defined in the Civil Aeronautics Act of 1938, as amended". He stated:

> "It seems to me that Section 408(b) of the Act, sought by the majority to provide a basis for its action in this case, was meant to bestow upon the Board

power only over the carrier involved in a consolidation, merger, purchase or lease. I do not agree that Section 408(b) by conditioning a consolidation or acquisition 'upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe' is broad enough to include terms and conditions to be imposed upon a labor group which neither sought nor opposed the purchase or acquisition" (R. Vol. II, pp. 61a-62a).

On appeal by petitioner the orders of the Board were affirmed. The Court of Appeals concluded that, notwithstanding the absence of express statutory authority for the Civil Aeronautics Board's jurisdiction over the seniority question, the Board, nevertheless, had the power to order the integration of seniority lists and to enjoin Pan American and its employees from freely bargaining in the future on the subject of seniority; that this power was derived from the general statutory provisions which contemplated the adequate protection of the paramount public interest. (R. Vol. III, pp. 118-120; 204 F. 2d at 265-266).

Reasons for Granting the Writ

I

If the holding of the Court of Appeals is correct, any administrative agency with the usual general powers to regulate a specific industry could unilaterally write and enforce a labor agreement between employers and employees in that industry. This view represents a far-reaching and significant departure from the established policy of Congress against compulsion in labor matters, and may well form the basis for similar expansive interpretations of the power of other administrative bodies in other fields. It, therefore, should be reviewed by this Court.

Congress never intended that the Civil Aeronautics Board should control labor matters in the aviation industry. Such controls as Congress sought to impose upon collective bargaining in the air transport industry were incorporated into the Railway Labor Act (44 Stat. 577 *et seq.;* 45 U. S. C. A., Sec. 181 *et seq.*) and are administered by the National Mediation Board.

It is significant that, while the Civil Aeronautics Board has been given jurisdiction over almost all of the aspects of commercial air transportation, Congress relegated the problems arising from labor disputes in the air transportation industry to a different administrative body. Only the National Mediation Board has jurisdiction over the labor problems in the air transport industry, and even it has no coercive authority or jurisdiction to foist any contract provision upon any group of employees.

Congress has heretofore rejected any policy of compulsory arbitration of labor disputes whereby, for example, labor agreements binding upon employer and employee would be written by administrative agencies on the basis of evidence adduced at a hearing. It has in all labor legislation, scrupulously preserved labor's freedom to bargain and, if necessary, to strike. Our system of law contains no instance where an agreement affecting terms and conditions of employment may be directed by an administrative agency. Even the War Labor Board created during the emergency of a global war had only advisory powers (*National War Labor Board* v. *Montgomery Ward and Co., Inc.,* 144 F. 2d 528 (D. C. Cir., 1944), certiorari denied 323 U. S. 774; *Employers Group of Motor Freight Carriers Inc.* v. *National War Labor Board,* 143 F. 2d 145, 148-151 (D. C. Cir., 1944), certiorari denied 323 U. S. 735).

It is, therefore, inconceivable that Congress should, by the use of general words unrelated to labor problems or collective bargaining agreements, have granted to the Civil Aeronautics Board the power now claimed for it to write a

labor agreement and to force its adoption by employer and employees, or to settle a seniority dispute by administrative fiat. The Court of Appeals for the Second Circuit has itself held that seniority disputes arising from the route transfer involved in the case at bar are disputes "concerning changes in pay, rules or working conditions" as that phrase is used in the Railway Labor Act. *O'Donnell* v. *Pan American World Airways, Inc.*, 200 F. 2d 929, 931 (1953). Consequently, there can be no question that the proper methods for resolving the seniority dispute here in question are those prescribed by Congress in the Railway Labor Act.

Nevertheless, the Court below held that:

> "The authority of the Board to deal with proposed mergers of this type is as provided in Sec. 408 of the Civil Aeronautics Act of 1938 (49 U. S. C. § 488). Its authority over the transfer of a certificate of public convenience and necessity is derived from Sec. 401 (49 U. S. C. § 481) and its general powers and duties are as provided in Sec. 205 (a) (49 U. S. C. § 425(a)). This statutory authority is broad enough to enable the Board to approve a merger and transfer of a certificate upon 'such terms and conditions as it shall find to be just and reasonable' in the public interest. Although there is no express statutory grant of power to impose conditions which will lessen the adverse impact of a merger upon employees of the merged companies, such power is implicit as one necessary to the performance of the Board's duty to condition approval with due regard to terms which are just and reasonable in the interest of the public. This public interest, though not broadly one of general employee welfare, is to obtain the degree of stability in air transportation that freedom from industrial strife will provide. Western Air Lines v. Civil Aeronautics Board, 9 Cir., 194 F. 2d 211

> • • • An overall supervision of the merging carrier so as to protect adequately the public interest is what Sec. 408 (b) of the Act contemplates, and that is what these orders accomplish. The same power to order the initial integration justifies the Board's further requirement that the employer refrain from making any labor contract in the future which will not conform to it" (R. Vol. III, pp. 118-120; 204 F. 2d at 265-266).

The provisions of Section 408 of the Civil Aeronautics Act making the Board's approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control contingent "upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe," unquestionably intended the terms and conditions to be imposed upon the carrier seeking the consolidation or merger and not upon a labor group which neither sought nor opposed the transaction.

While, as stated in the Board's brief below (p. 10) "The *orders* here under review are, of course directed to the carrier and to the carrier alone," the *condition* is imposed upon the Pan American employees. They are the target at whom these orders were aimed. They are the only ones who, by virtue of the order, must part with anything of value; they are the ones to pay the consideration for the Board's approval of Pan American's application for the merger. Pan American, upon whom the condition is allegedly imposed, neither gains nor loses by its imposition. Only in bare form is it a "condition" annexed to the approval of Pan American's application for leave to purchase the American Overseas Airlines' assets. In fact, it is a condition imposed upon Pan American's employees who neither sought approval of the sale nor had the opportunity (which Pan American always had) of rejecting the condition and abandoning the sale. True

"conditions" for the protection of employees must, in form and in fact, be imposed upon the carrier who may accept or reject them.

Congressional intent aside, by the very language of Section 408, the imposition of terms and conditions in connection with the application for consolidation must, of sheer grammatical necessity, impose such terms and conditions upon the applicant alone; certainly not upon one never mentioned in the statute.

Further, Section 205 of the Civil Aeronautics Act, referred to by the Court below, grants only those powers incidental to and within the framework of the specific powers conferred by the other sections of the Act. This section cannot serve as the "residuary clause" of the Act, bequeathing all powers not specifically enumerated.

In the Board's brief in the appeal below (p. 9), there appears a quotation from *Western Air Lines* v. *Civil Aeronautics Board,* 194 F. 2d 211, 213 (9th Cir., 1952), which reads in part:

> "See § 408 of the Act. The latter section expressly authorizes approval of the acquisition 'upon such terms and conditions as the Board shall find to be just and reasonable and with such modifications as it may prescribe * * *' The only problem, then, is whether conditions for the protection of employees can reasonably be said to bear a substantial relation to the public interest."

The Board then goes on in its brief to say (p. 10):

> "Thus, the only limitation upon the Board's power to attach conditions to certificate and property transfers is that they bear a just and substantial relationship to the public interest which is to be served in the administration of the Civil Aeronautics Act."

It appears, from the holding below, that the Court of Appeals for the Second Circuit is of the same opinion.

It is important to note that in the *Western Air Lines* case the only condition for the protection of employees there involved was the *financial* compensation of those employees displaced by the transfer.

It is further submitted that while the "public interest" serves as a factor in defining the limits of the administrative power *it cannot create that power.*

In *American Trucking Association* v. *United States,* 73 S. Ct. 307 (1953) and *National Broadcasting Co.* v. *United States,* 319 U. S. 190 (1943), this Court likewise dealt with the problem of whether an administrative agency had exceeded its statutory power in issuing and attempting to enforce certain regulations concerning, respectively, motor vehicle leasing and interchange, and chain broadcasting.

It is significant that in both cases the Court placed great emphasis upon the provisions of the applicable statutes in spelling out the power of the respective commissions to enforce the regulations there involved. Indeed, the Court systematically analyzed the statutes section by section to show the explicit grant of power in each instance (*e. g.,* at 73 S. Ct. 314-318; and at 319 U. S. 214-224). No mere rule of "public interest" was relied upon in these cases. In fact, at page 216 of the opinion in the *National Broadcasting Co.* case, the Court quotes with approval from *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.,* 289 U. S. 266, 285 (1933) where it was said of the standard of "public interest, convenience, or necessity" which limited the Federal Radio Commission:

> "This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power."

Reference is also made by the Court in the *National Broadcasting Co.* case to the opinion in *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24 (1932) wherein it was held:

> "It is a mistaken assumption that this (criterion of 'public interest') is a mere general reference to public welfare without any standard to guide determinations."

It is pertinent at this point to quote from this Court's opinion in *Jones* v. *SEC*, 298 U. S. 1, 24 (1935):

> "• • • To escape assumptions of such power on the part of the three primary departments of the government, is not enough. Our institutions must be kept free from the appropriation of unauthorized power by lesser agencies as well. And if the various administrative bureaus and commissions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties."

Everything said by the Court below in relation to seniority could be said with equal force in relation to the fixing of the compensation of employees of a company seeking to purchase the assets of another. If the company is paying wages below the industrial standard certainly it is in the public interest to order that they be increased. If its wage scale is above the standard, adjustment of this impediment to its economical operation will remove an

"undue advantage" of its competitors. As a practical matter, the determination of seniority is no different from the determination of wages, hours of work or any other subject of a collective bargaining agreement.

II.

The decision below is contrary to principles clearly established in authoritative interpretations of the powers conferred on the Interstate Commerce Commission, another federal agency which has considered problems similar to that presented herein. The departure of the Court of Appeals from those principles constitutes further reason for review by this Court of the statutory basis for the assertion of jurisdiction by the Civil Aeronautics Board to write and enforce a labor contract.

Unlike the Interstate Commerce Commission,[4] the Civil Aeronautics Board has no specific statutory authority to impose employee-protective conditions upon a carrier seeking to merge, consolidate, or acquire the assets of another carrier. Nevertheless, petitioner does not now argue that, in the absence of such specific statutory authority, the Board is completely without authority to impose conditions to protect employees. Petitioner does submit, however, that it is important, in determining the extent and limitations of the power of the Board, to examine the history of the specific authority which Congress has granted to the Interstate Commerce Commission, and to note the crucial differences between the powers granted to the two agencies.

Our entire law on the right of an administrative agency to establish employee protection as a condition of the approval of a merger, consolidation or acquisition of the assets of another carrier is derived from the holding of

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[4] Interstate Commerce Act, Sec. 5(2)(f), 54 Stat. 906-907, 49 U. S. C., Sec. 5(2)(f).

this Court in *United States* v. *Lowden*, 308 U. S. 225, 1939. That case arose before any Congressional enactment specifically authorized the Interstate Commerce Commission to condition the approval of a merger, consolidation or acquisition of the assets of a carrier upon the granting of protection to employees.

The *Lowden* case involved federal receivers for two railroads who applied to the Interstate Commerce Commission for leave to lease one of the lines for which they were receivers to themselves as receivers of the other line. The Interstate Commerce Commission granted the application upon condition that certain payments be made to employees who might be adversely affected as the result of the lease. Objection was made to the imposition of these financial protective conditions and the matter was carried to this Court which approved the granting of payments to employees adversely affected by the lease. One of the most persuasive reasons advanced for making cash payments to employees adversely affected, was, in the opinion of the unanimous court, that the existence of seniority systems created by contract between the railroads and their employee groups, would adversely affect some employees. In his opinion for the Court, Mr. Justice Stone said:

> "Not only must unification result in wholesale dismissals and extensive transfers, involving expense to transferred employees, but in the loss of seniority rights which, by common practice of the railroads are restricted in their operation to those members of groups who are employed at specified points or divisions. It is thus apparent that the steps involved in carrying out the Congressional policy of railroad consolidation in such manner as to achieve the desired economy and efficiency will unavoidably subject railroad labor relations to serious stress and its harsh consequences may so seriously affect employee morale

> as to require their mitigation both in the interest of the successful prosecution of the Congressional policy and of the efficient operation of the industry itself, both of which are of public concern within the meaning of the statute." (308 U. S. at 233).

His opinion continued, at page 238:

> "In the light of that record too we do not doubt that Congress, by its choice of the broad language of § 5 (4) (b) intended at least to permit the Commission, in authorizing railroad consolidations and leases, *to impose upon carriers conditions related,* as these are, to the public policy of the Transportation Act to facilitate railroad consolidation, and to promote the adequacy and efficiency of the railroad transportation system."

Thus this Court unanimously validated the order of the Interstate Commerce Commission (issued pursuant to its general powers and without specific statutory authority) which approved the lease *upon the condition* that "for a period not exceeding five years each retained employee should be compensated for any reduction in salary so long as he is unable, *in the exercise of his seniority rights under existing rules and practices to obtain a position with compensation equal to his compensation at the date of the lease* * * *" (308 U. S. at 228; emphasis supplied). The order thus affirmed was based on the premise that in such consolidations *seniority rights must be preserved,* and the impact on employees alleviated, as Congress intended, *by financial conditions imposed upon the employer.*

This decision, which constitutes the fountainhead of all learning on the subject of protective conditions of employees, constitutes almost a square holding that seniority rights may not be affected by an order of the administrative agency having jurisdiction over the approval of

mergers, consolidations, and the acquisition of assets of carriers. It indicates that the need for financial protective conditions would be lessened if seniority rights were to be disregarded or overridden; it shows that the court never contemplated that an administrative agency would even attempt to interfere with existing seniority rights; and it demonstrates that the purpose of financial protective conditions was to preserve employee morale, not to destroy it by a watering down of seniority rights. And finally, it indicates that the conditions are to be imposed upon the carrier and on no one else.

Certainly, the power of the Board, without any express statutory authority, cannot be broader than that which the court approved in *United States* v. *Lowden.* The Board may impose financial protective conditions upon the carrier; it may not dilute vested seniority rights.

Ten years after the decision of *United States* v. *Lowden,* this Court in *Railroad Labor Executives' Association* v. *United States,* 339 U. S. 142 (1950), again had an opportunity to pass upon the power of the Interstate Commerce Commission to apply protective conditions for employees as an incident of a merger, consolidation or purchase. And again this Court indicated that by protective conditions it meant *financial* protective conditions. In discussing the history of former Section 5(4)(b) of the Interstate Commerce Commission law (the precursor of Section 5(2)(f) which now gives the Interstate Commerce Commission express power to empose employee protective conditions), it stated (339 U. S. at 147-148):

> "There was, however, a widespread awareness in the railway industry that many economies to be gained from consolidation or abandonment could be realized only at the expense of displaced railway labor. The interest of such employees was recognized in the Washington Job Protection Agreement of 1936. This was a collective bargaining contract approved by about

85% of the railroad carriers and 20 of the 21 railroad brotherhoods. It contained a schedule of *substantial financial benefits* recommended for employees adversely affected by consolidation and so-called 'coordinations.'

"Section 5(4)(b) and the Washington Agreement were both in effect when, in 1939 [in *United States* v. *Lowden, supra*], this Court held that the Commission had power to prescribe terms and conditions *comparable to those in the Washington Agreement.*"

Thus the court, in its latest pronouncement on the subject, has stated that in its prior holding in *United States* v. *Lowden* it was dealing with the same type of "*substantial financial benefits*" as those which had been previously provided for in the Washington Job Protective Agreement. And it stated in so many words that the decision in *United States* v. *Lowden* held that the Commission had power to prescribe terms and conditions comparable to those provided in the agreement.

It is significant that in the opinion of this Court in *Railroad Labor Executives' Association* v. *United States,* 339 U. S. at 149, n. 11, the testimony of George M. Harrison, then President of the Railway Labor Executives' Association, in the Congressional hearings, was accepted as clarifying the meaning of Sec. 5(2)(f) of the Interstate Commerce Act.[5]

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[5] 54 Stat. 906-907, 49 U. S. C., Sec. 5(2)(f), an amendment added in 1940 to supersede Section 5(4)(b). The relevant portion which was construed in the *Railroad Labor Executives' Association* case reads:

"As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected."

In the proceedings before the Civil Aeronautics Board in the case at bar, the same George M. Harrison, then President of the Brotherhood of Railway and Steamship Clerks, whose interpretation of the statutory authority of the Interstate Commerce Commission was previously given great weight by this Court, testified as to his interpretation of the power of the C. A. B. His testimony is summarized at pages 124-129, both inclusive of the original report of Examiner Wrenn (R. Vol. III, pp. 8-12). That report indicates that Mr. Harrison took the position that *"integration of seniority is a question to which the Board's authority does not extend as well as one with which it is ill equipped to deal."* In continuing to summarize the position taken by Mr. Harrison, the Examiner's report states (R. Vol. III, pp. 10-11).

> "First, seniority rights rise out of bargaining agreements and are controlled by their provisions. Existing bargaining agreements covering employees of Pan American provide that new employees come in as junior to men in service. Accordingly, any action by the Board conditioning approval of the merger upon an integration of seniority rights would direct an amendment to existing bargaining agreements. The Brotherhood states that the Board is not the proper tribunal to interpret bargaining agreements, let alone direct a change in their provisions.
>
> "Second, seniority lists are not within the control of the carrier, and any condition regarding integration of seniority would be outside its power to fulfill in the absence of agreement by the employees involved."

While there is no doubt that the Board has the right to impose financial protective conditions for the benefit of employees upon a carrier who seeks permission of the Board for a consolidation, merger, or purchase, it would be laboring the ordinary meaning of language to contend that the interference with seniority rights constitutes a

protective condition. The Board has the power, and perhaps the duty and obligation, of protecting employees in the event of a consolidation, merger or purchase. But the power to protect does not encompass the power to confiscate. In this instance the Board's orders involve a dilution or a destruction of seniority rights held by veteran Pan American employees. The confiscation of such seniority rights for the benefit of another group of employees cannot be deemed protection. In this case the Board gives to a minority group of employees, rights which were formerly, and now are, held by the majority.

The situation is analogous to an order of the Board which would provide for compensation to all employees discharged as a result of a merger and then provide that such compensation should in part be paid by the employees who have not been discharged as a result of the merger. The Board seeks to give to the AOA employes something which was formerly and now is, owned by the veteran Pan American Flight Engineers.

We do not now argue that Congress could not adopt legislation limiting the right to collective bargaining and dictating the establishment of seniority lists. But we do argue that Congress has never given the Board such power and that its attempt to usurp a power it does not possess constitutes a highly dangerous precedent. In the decision of the Court below we have, perhaps for the first time in our history, an adjudication sustaining an attempt by an administrative agency to write a labor contract and to dictate its adoption by employee and employer.

III

It is clear from the foregoing that the decision below opens the door to complete subversion of the clearly expressed intention of Congress not to permit interference with normal labor relations by imposition of administratively determined and sanctioned labor agreements. Con-

sequently, it is important that this Court review the vital question of administrative power here presented. But, furthermore, it is plain, from the announced policy of the Civil Aeronautics Board,[6] that mergers of air carriers, and transfers and consolidations of air routes are certain to occur with increasing frequency. It is important, therefore, that this basic jurisdictional issue concerning resultant labor disputes be determined by this Court at the earliest opportunity.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

July 1953.

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New York, N. Y.

FRANK S. KETCHAM,
Washington, D. C.

Counsel for Petitioner.

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[6] In his "Report on Civil Aviation, June 1951 through October, 1952," Donald W. Nyrop, then Chairman of the Civil Aeronautics Board, said:

> "The Civil Aeronautics Board in the summer of 1951 reviewed the domestic route pattern in several critical areas and took appropriate steps to encourage mergers as a method of correcting existing unbalance in economic opportunities between air carriers. The Board was convinced that through mergers of complementary carriers and consolidation of route segments better service to the public could be rendered at less cost to the Government. As a result of the Board's program in connection with mergers there have been completed two trunkline mergers and one merger of local service carriers. This action marks a significant change in the number of air carriers serving the domestic United States." 19 J. Air Law and Comm. 462, 465.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 205

WILLIAM D. KENT, as President of Flight Engineer Officers' Association, and as President of Flight Engineers' International Association—PAA Chapter, also known as Flight Engineer Officers' Association, *Petitioner*

v.

CIVIL AERONAUTICS BOARD, and PAN AMERICAN WORLD AIRWAYS, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit (R. III, 116) is reported at 204 F. 2d 263. The findings and order of the Civil Aeronautics Board, entered September 22, 1950 (R. II, 6a), are reported at 12 C.A.B.

124. The findings and order of November 27, 1951 (R. II, 33a), are not yet reported.

JURISDICTION

The judgments of the Court of Appeals were entered on June 4, 1953 (R. III, 121, 122). The petition for a writ of certiorari was filed on July 24, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, as a condition to its approval of a merger between air carriers, the Civil Aeronautics Board is authorized by statute to attach protective labor conditions, including, specifically, a provision requiring the surviving carrier to integrate into its labor seniority lists the employees of the other carrier.

2. If so, whether the Board's exercise of this power may be limited or defeated by the terms of an outstanding labor contract between the acquiring carrier and certain of its employees.

STATUTE INVOLVED

The pertinent provisions of the Civil Aeronautics Act are set forth in the Appendix, *infra*, pp. 14-17.

STATEMENT

In 1948, Pan American World Airways, Inc. (Pan American) and American Overseas Airlines, Inc. (AOA) entered into a contract whereby Pan American was to take over all of the assets of AOA, including its certificate of public conven-

ience and necessity for operations between the United States and Europe. Under the merger agreement, Pan American was to seek to integrate into its organization all AOA employees (R. II, 35a). This agreement was duly submitted for the approval of the Board under Sections 401(i) and 408 of the Civil Aeronautics Act (*infra*, pp. 15-16), and the approval of the President under Section 801 of the Act, 52 Stat. 1014, 49 U.S.C. 601. On July 10, 1950, the Board, at the direction of the President, approved the merger (R. III, 25),[1] at the same time retaining jurisdiction in order to formulate and impose appropriate labor protective conditions (R. III, 25, 26).

During the original proceedings on the application, extensive consideration had been given to the problem of providing protection for the employees of the respective carriers in the event of approval of the merger. The Board recognized that, while the acquisition of the routes and aircraft of AOA by Pan American would greatly increase the number of employees required by the latter carrier, some employees would be faced with demotion or loss of employment. One aspect of the problem was to fix appropriate terms for monetary compensation of such employees. Another was the matter of providing a method for the integration of the personnel of the two carriers. This involved principally the question of

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[1] The President's authority to direct approval, under Section 801, of a proposed merger involving foreign air transportation was upheld in *Trans World Airlines* v. *Civil Aeronautics Board*, 184 F. 2d 66 (C.A. 2), certiorari denied *sub nom. Sparks* v. *Civil Aeronautics Board*, 340 U.S. 941.

integrating seniority lists. With respect to flight personnel, seniority largely determines, for example, whether a pilot shall be assigned as a captain or co-pilot, or whether an engineer shall be assigned as a flight engineer or assistant flight engineer. The differences in salaries between the respective positions are substantial. The Board recognized that if the AOA employees were deprived of all seniority and required to go to the bottom of Pan American's lists as new employees of that company, many of them would be demoted. By the same token, certain of their Pan American opposites would obtain a windfall—the opportunity to fill all of the additional higher-ranking positions attributable to the merger (see R. III, 4, 5, 7). The Board also found that the requirement of providing monetary compensation to employees adversely affected by the merger would become prohibitive in cost if there were no provision made for integration (see R. III, 7). Failing, however, in its initial efforts to obtain voluntary agreement on a plan mutually satisfactory to the employee groups involved, the Board left open the ancillary issues relating to labor protection.

Subsequently, on September 22, 1950 (R. II, 24a), the Board entered its first labor protective order. In addition to requiring Pan American to pay certain allowances for a 21-month adjustment period to employees suffering pecuniary loss from the merger, the order provided that Pan American should integrate retained AOA employees into its existing seniority lists by such method as should be established by agreement between it and

the employee groups concerned, or, failing agreement, pursuant to arbitration (R. II, 25a, 26a).

Certain groups of employees thereupon settled their seniority problems by agreement (R. III, 33). However, the pilots, flight engineers, flight service personnel and mechanics reached a stalemate, the Pan American personnel refusing to consider any proposal other than that the AOA employees be placed at the bottom of the seniority lists. Mediation and arbitration were rejected by these Pan American groups (R. III, 29, 34). The Board thereupon entered an interim order directing the maintenance of separate rosters for the non-integrated personnel, with job assignments to be made on a ratio basis from the AOA and Pan American lists (R. III, 51). Active efforts were made by the Pan American groups to forestall the commingling on flight crews of Pan American and AOA employees, a course of action which, the Board found, interfered with the company's operations and imperilled the achievement of the objectives intended to flow from the merger (R. II, 39a; III, 82).

Still further efforts to promote a voluntary solution failing (see R. II, 37a-41a), the Board, after a full hearing, entered its order of November 27, 1951, directing that integration be effectuated on the basis of counting length of service with AOA as the equivalent of service with Pan American (R. III, 110, 112). The order also prohibited Pan American from entering into any future labor agreement which would place the former AOA employees in a worse position with respect to seniority than that ordered by the

Board (R. III, 114). This action was taken on the basis of findings (1) that it would be unfair to the AOA employees if they were required to go to the bottom of the seniority lists (R. II, 48a); (2) that future mergers would be discouraged through pressures by labor on management if the employees here involved were not assured of equitable treatment (R. II, 48a); (3) that internal strife concerning the seniority problem might seriously affect Pan American and impair achievement of the objectives intended to be obtained by the merger (R. II, 48a, 49a); and (4) that the method of integration prescribed would not place the Pan American employees in a position worse than that which they had occupied prior to the merger, but would actually cause some of them to be promoted (R. II, 53a, 58a).[2]

The effective date of the order directing integration was subsequently stayed by the Board so that the National Mediation Board might undertake to mediate the issue. Review proceedings initiated by petitioner in the Court of Appeals were likewise held in abeyance pending these efforts. Voluntary settlement failed once again,[3]

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[2] There are approximately 220 flight engineers who were Pan American employees at the time of the merger. Seventy-two AOA engineers were taken over by Pan American (R. III, 101). Integration by the method prescribed by the Board would have resulted in the immediate reduction of 18 AOA engineers to the status of assistant engineers, and the promotion of 18 Pan American assistant engineers to the status of engineers (R. III, 104).

[3] It may be noted parenthetically that all other employee groups ultimately settled the seniority issues.

and the Board, on March 2, 1953, directed that its earlier order prescribing integration of flight engineers should take effect upon the completion of judicial review.

The Court of Appeals (Augustus N. Hand, Chase and Clark, Circuit Judges) affirmed the Board's orders as establishing a just and reasonable condition upon the merger, required in the public interest for the purpose of obtaining "the degree of stability in air transportation that freedom from industrial strife will provide" (R. III, 119), and as providing with "meticulous care" a method which fairly distributed the employee burdens and benefits of the merger (R. III, 120). Assuming, *arguendo,* that the Board's orders conflicted with petitioner's collective bargaining agreement with Pan American, the Court of Appeals held that the contract "must yield to the paramount power of the Board to perform its duties under the statute * * * " (*ibid.*).

ARGUMENT

Contrary to petitioner's suggestion (Pet., pp. 8-9), this case presents no broad issue as to whether the Board may control labor disputes in the aviation industry. The issue presented and decided below is a narrow one—whether the Board may, when necessary in the public interest and as a condition to its approval of the merger of two air carriers, prohibit the surviving carrier from discriminating, with respect to seniority, against employees of the merged carrier. The Court of Appeals held only that the Board has such power.

The power of the Board to impose the conditions here involved is derived from Sections 401(i) and 408(b) of the Civil Aeronautics Act (*infra,* pp. 15, 16-17), as supplemented by Sections 2 and 205(a) (*infra,* pp. 14-15). Section 401(i) provides that a certificate transfer shall not be approved unless found by the Board to be "consistent with the public interest." Section 408(b), which governs consolidations and mergers of air carriers, provides that, unless the Board finds that the merger "will not be consistent with the public interest * * * it shall by order, approve [such merger] * * * upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe." Section 2 sets forth the statutory criteria of "public interest." Section 205(a) confers full power upon the Board to take such actions as may be necessary to implement its authority under the other sections of the Act.[4]

It is true that the statute, in authorizing the Board to attach just and reasonable conditions to certificate transfers and mergers, does not in terms address itself to labor protective conditions. This was equally true, however, of the Interstate Commerce Act when this Court, in *United States* v. *Lowden,* 308 U.S. 225, considering the powers of the Interstate Commerce Commission under a virtually identical statutory provision (Interstate

[4] Cf. *American Trucking Associations* v. *United States,* 344 U.S. 298, 311, construing a similar provision of the Interstate Commerce Act, Part II.

Commerce Act, Sec. 5 (4) (b), 48 Stat. 217),[5] upheld that agency's authority to require monetary compensation to employees adversely affected by a railroad merger. And see *Western Air Lines* v. *Civil Aeronautics Board,* 194 F. 2d 211 (C.A. 9). Petitioner, conceding, as he must, the power of the Board to protect adversely affected AOA employees by providing monetary compensation (Pet., pp. 15, 18), questions its authority to prescribe conditions designed to protect the status of such employees. But conditions relating to the preservation of status or seniority plainly do not differ in kind from conditions requiring compensation for demotion or loss of employment. Far from lending any support to such a distinction, the *Lowden* decision significantly states (308 U.S. at 238) that "Congress, by its choice of the broad language of §5 (4) (b) intended *at least* to permit" the attachment of the conditions there formulated (emphasis supplied).[6]

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[5] Amendatory legislation has made it mandatory, rather than discretionary, for the Interstate Commerce Commission to protect the interests of railroad employees affected by a merger. Interstate Commerce Act, Section 5(2)(f), 54 Stat. 906. Speaking of this legislation, which had passed both houses of Congress when the *Lowden* case was decided, this Court commented (308 U.S. at 239) that its effect "was to give legislative emphasis to a policy and a practice already recognized." See, also, *Railway Labor Ass'n* v. *United States,* 339 U.S. 142, 148.

[6] Prior to this Court's *Lowden* decision, the Commission, in at least two instances, had undertaken to write conditions expressly designed to preserve seniority rights. *St. Paul Bridge & Terminal Ry. Co. Control,* 199 I.C.C. 588, 595-7 (1934); *Louisiana & Arkansas Ry. Co. Merger,* 230 I.C.C.

The rationale of the *Lowden* decision applies with full force to the case at bar. Speaking of the protective provisions adopted by the Interstate Commerce Commission in that case, this Court stated (308 U.S. at 238):

> * * * we cannot say that the just and reasonable conditions imposed on appellees * * * will not promote the public interest in its statutory meaning by facilitating the national policy of railroad consolidation; that it will not tend to prevent interruption of interstate commerce through labor disputes growing out of labor grievances, or that it will not promote that efficiency of service which common experience teaches is advanced by the just and reasonable treatment of those who serve.

Mergers and consolidations in the air industry are likewise in the public interest when they give promise of improved and more economical trans-

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156, 165 (1938). Whenever possible, the Commission (like the Board in the instant case) has attempted to promote a settlement of seniority problems by voluntary agreement. See *Franklin* v. *Pennsylvania-Reading Seashore Lines,* 122 N. J. Eq. 205, 193 A 712; R. II, 46a. Petitioner is thus seriously in error in supposing (a) that seniority rights are characteristically lost in cases of railroad mergers and consolidations, and (b) that the Board's action in this case represented a departure from established administrative practice. In truth, the Board's practice in this case constitutes a continuation of an administrative approach developed by the Interstate Commerce Commission before the problem arose under the Civil Aeronautics Act. See, also, *Commercial Telegraphers' Union, A.F.L.,* v. *Western Union Telegraph Co.,* 53 F. Supp. 90 (D. D.C.).

portation services (Sec. 2, *infra,* pp. 14-15). The Board has found that future mergers, otherwise desirable, will be discouraged through pressures by labor on management if employees of the carriers involved are not assured of fair and equitable treatment (R. II, 48a). It needs no argument, in the light of the record (see *supra,* pp. 3-7), to show that a prompt and reasonable solution of the protracted dispute between the Pan American and ex-AOA flight engineers is essential, both from this standpoint and from the standpoint of avoiding the interruption to interstate commerce which might be engendered by continuing disaffection and strife within the Pan American organization.

Petitioner argues (Pet., p. 12) that, as a matter of "sheer grammatical necessity," the Board, in acting pursuant to Sections 401(i) and 408, is limited to imposing conditions upon the carrier. The orders here in issue are directed to the carrier and to the carrier alone. Petitioner's point would seem to be that the employees of Pan American, as well as the company, will be affected by the Board's action. While this is doubtless true, it is scarcely decisive. Every order imposing labor protective conditions, by definition, affects the employees as well as the carrier. The fact that action directed to a member of a regulated industry may affect or limit the activities of third persons affords no basis for invalidating that action. *American Trucking Associations* v. *United States,* 344 U.S. 298; *Ambassador, Inc.* v. *United States,* 325 U.S. 317; *National Broadcasting Company* v. *United States,* 319 U.S. 190; cf. *Commercial Telegraphers' Union, A.F.L.,* v. *Western Union Tel-*

egraph Co., 53 F. Supp. 90 (D.D.C.). The question here is not whether persons other than the carrier (or the contracts of such persons) are affected by the order. It is whether the conditions imposed, viewed in the light of statutory objectives, are just and reasonable and bear a substantial relationship to the public interest. As the Court of Appeals held, following a full review of the record, that test is completely satisfied.

There is, accordingly, no merit in the contention that the Board's orders are invalid because they cut across a provision regarding seniority ("Seniority as an Engineer shall be based upon his length of service as an Engineer with the Company"—R. I, 11) in a collective bargaining agreement negotiated by Pan American and its flight engineers prior to the merger. The Court of Appeals pretermitted the question whether the labor contract may be properly construed as covering the situation created by a merger of the contracting company with another company. It held that, in any event, "A private contract must yield to the paramount power of the Board to perform its duties under the statute creating it to approve mergers and transfers of certificates such as are here involved only upon such terms as it determines to be just and reasonable in the public interest" (R. III, 120). We submit that the Court was clearly correct in this holding that the contractual provisions, whatever their meaning, must yield to the supervening regulatory requirements imposed by the Board in the public interest. See *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, 285; *National*

Broadcasting Co. v. *United States,* 319 U. S. 190; *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 365; *Federal Radio Commission* v. *Nelson Brothers Co.,* 289 U. S. 266, 282. See, also, Section 414 of the Civil Aeronautics Act (*infra,* p. 17); cf. *Schwabacher* v. *United States,* 334 U. S. 182, 194, 195.

CONCLUSION

The decision below is correct, there is no conflict of decisions, and no substantial question warranting review by this Court is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST, 1953.

APPENDIX

The relevant provisions of the Civil Aeronautics Act of 1938, as amended (52 Stat. 973, 49 U.S.C. 401, *et seq.*), are:

Declaration of Policy

Sec. 2. In the exercise and performance of its powers and duties under this Act, the Authority [Board] shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the

foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

GENERAL POWERS AND DUTIES OF THE AUTHORITY [BOARD]

General Powers

Sec. 205 (a) The Authority [Board] is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Sec. 401—

Transfer of Certificate

(i) No certificate may be transferred unless such transfer is approved by the Authority [Board] as being consistent with the public interest.

CONSOLIDATION, MERGER, AND ACQUISITION OF CONTROL

Acts Prohibited

Sec. 408. (a) It shall be unlawful, unless approved by order of the Authority [Board] as provided in this section—

(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

* * * * *

Power of Authority [Board]

(b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Authority [Board], and thereupon the Authority [Board] shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Authority [Board] finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order, approve such consolidation, merger, purchase, lease,

operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: * * *

LEGAL RESTRAINTS

Sec. 414. Any person affected by any order made under sections 408, 409, or 412 of this Act shall be, and is hereby, relieved from the operations of the "antitrust laws," as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

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Petitioner,

v.

CIVIL AERONAUTICS BOARD and PAN AMERICAN WORLD AIRWAYS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE INTERVENORS IN OPPOSITION

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE INTERVENORS IN OPPOSITION

The Intervenors

Intervenors are (1) the flight engineers formerly employed by the American Overseas Airlines (referred to as "AOA") whose jobs (72 in number) were brought over and added to the personnel roster of the Pan American World Airways (referred to as "PAN AMERICAN") as a result of the proceeding known as the *North Atlantic Route Transfer Case* before the Civil Aeronautics Board (referred to as "BOARD") and (2) the labor union representing the AOA flight engineers, AOA Chapter, Flight Engineers International Union, A.F.L.

The United States Court of Appeals for the Second Circuit granted to Intervenors the right of intervention in the consolidated review proceedings brought by Petitioner before that Court (R. II, 3a).

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit (R. III, 116) is reported at 204 F. 2d 263. The order and findings of the Civil Aeronautics Board, entered September 21, 1950 (R. II, 6a) are reported at 12 C.A.B. 124. The Board order and findings of November 27, 1951 (R. II, 33a) are not yet reported.

Jurisdiction

The judgments of the Court of Appeals were entered on June 4, 1953 (R. III, 121, 122). The petition for a writ of certiorari was filed on July 24, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the Board, in the exercise of its exclusive statutory authority to prescribe "just and reasonable" conditions in approving a merger between air carriers, can seek to preserve the seniority of the employees of both carriers rather than to suffer the stripping of all earned seniority from the employees of the merged carrier whose jobs were brought over in the merger.

2. Whether the seniority provision of a collective agreement which neither anticipated nor contemplated the enlargement of the bargaining unit by a merger of carriers can be so used as to destroy completely the seniority rights of the absorbed employees and thus frustrate the full benefits of a merger approved in the public interest.

Statement

The history of this proceeding and the salient facts are correctly stated in the Board's brief to this Court (pp. 2-7). Petitioner's application to this Court does not challenge the facts; it just omits mention of the significant ones, including the following:

1. The consolidation of AOA with PAN AMERICAN did not reduce the number of top level flight engineer jobs at Pan American; it increased them (R. III, 104);

2. The engineer jobs added, 72 in number, had all been previously filled for varying numbers of years by Intervenors, the AOA engineers, who also enjoyed length of service seniority under their collective agreement with AOA (R. III, 100, 101);

3. By adding those jobs to Pan American the overall seniority of Petitioner's group would be enhanced and improved under the Board's order (R. II, 52a, 58a), rather than involve, as Petitioner argues, their "dilution", "destruction" or "confiscation" (Pet., p. 21).

4. Thus, under the Board's proposed length of service formula, "of the first 148 places on the seniority list based on date of hire Pan American flight engineers would receive 137 places to 11 for American Overseas, a ratio of 13 to 1, notwithstanding that American Overseas flight engineers created and developed all the top jobs that came with the consolidated operation" (R. III, 80);

5. Petitioner, by threats of strike and its adamant refusal to permit the carrier to commingle AOA and PAN AMERICAN engineers on scheduled flights, has blocked integration as ordered (R. II, 32a; III, 82, 83);

6. Petitioner's insistence that AOA engineers must yield all their earned seniority in order to come into the

employ of PAN AMERICAN has rendered futile the repeated mediation efforts of the National Mediation Board under the Railway Labor Act (44 Stat. 577 *et seq.;* 45 U.S.C.A., §181 *et seq.*) as well as all efforts at voluntary compromise and agreement, the method preferred and encouraged in both orders of the Board here under attack by Petitioner (R. II, 37a-41-a).

In affirming the Board's orders, the Court of Appeals (Augustus N. Hand, Chase and Clark, Circuit Judges) recognized that the merger confronted the Board with "two or more groups of employees each having separate seniority rights" (R. III, 119) and held that the Board's reconciliation of those rights was properly fashioned on the basis of a measure of parity rather than, as Petitioner would have it, the complete subordination of one group's seniority to that of the other (R. III, 120).

Argument

1. In reconciling the seniority rights of the employees of both carriers the Board is not engaged in any power thrust, as Petitioner claims, to "unilaterally write and enforce a labor agreement between employers and employees in that industry" (Pet., p. 8). Actually it is the Petitioner which is making the power lunge by its coercive conduct and unilateral insistence on the application of its pre-merger agreement to prevent and discourage the employment of the absorbed employees (R. III, 82, 83).

By seeking to destroy the seniority of the Intervenors, Petitioner is presuming to occupy the whole "positional field", enlarged as it has been by the merger, and to freeze the Intervenors out of employment by the surviving carrier (R. III, 82, 83). Petitioner's superiority in numbers over the Intervenors could hardly justify this conduct any more than it did against the minority in *Howard* v.

St. Louis-San Francisco Railway Co., 191 F. 2d 442, at p. 446 (affirmed by this Court on other grounds, 343 U. S. 768; 72 S. Ct. 1022).

By its refusal to accept the harsh consequences of Petitioner's conduct, the Board made no incursion on the normal prerogatives of collective bargaining. It had before it two sets of seniority rights, born of two separate collective agreements. It refused to permit the discriminatory destruction of one group's rights to the advantage of the other. Instead, to save the merger in the public interest, it sought to preserve as much of the rights of both groups as possible, cf. *Commercial Telegraphers Union* v. *Western Union Telegraph Co.*, 53 F. Supp. 90 (Dist. of Col.). This was the narrow issue presented in the Board's protective orders on seniority and the only one before the Court of Appeals.

2. The seniority clauses in the collective bargaining agreement upon which Petitioner rests its entire argument were, as the Board and its Examiner found, "written before the agreement between Pan American and American Airlines. Those clauses were designed to cover employees hired by Pan American and not employees brought over as a result of a merger. * * * Therefore, it follows that any action by the Board merging seniority would not violate the terms of the collective agreement as they were not intended to cover a merger or acquisition situation" (R. III, 97, 98; see also R. II, 49a, 50a).

While the Court of Appeals, as the Board's brief points out (p. 12), did not deem it necessary to pass upon this question, the Petitioner does not challenge the apposite facts. Nevertheless, Petitioner relies on such a pre-merger contract, "silent on all these matters" of seniority in the event of merger or acquisition (R. II, 51a), as the meager ground to persuade this Court to review the decision below.

In the meantime, by reason of successive stays of the Board's orders on seniority, Petitioner continues to insist that its pre-merger seniority clauses be applied to the Intervenors like the now condemned "yellow dog" clause in employment contracts wherein employees had to yield valuable rights in order to gain or retain employment. Cf. *Hitchman Coal and Coke Co.* v. *Mitchell*, 245 U. S. 229, 38 S. Ct. 65.

CONCLUSION

The decision below presents no substantial question warranting review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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